No. 99-971

In the Supreme Court of the United States

MARVIN CHERNA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record

JAMES K. ROBINSON
Assistant Attorney General

DEBORAH WATSON
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the evidence seized in a warrant-authorized search of petitioner's home, which was also the site of two fraudulent businesses petitioner operated, was admissible pursuant to the good-faith exception to the Fourth Amendment exclusionary rule.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Andresen v. *Maryland*, 427 U.S. 463 (1976)	16
Center Art Galleries-Hawaii, Inc. v. *United States*, 875 F.2d 747 (9th Cir. 1989)	14
Lo-Ji Sales, Inc. v. *New York*, 442 U.S. 319 (1979)	11-12
Massachusetts v. *Sheppard*, 468 U.S. 981 (1984)	7, 12
Riley v. *National Fed'n of the Blind*, 487 U.S. 781 (1988)	15, 16
United States v. *Abrams*, 615 F.2d 541 (1st Cir. 1980)	16
United States v. *Blakeney*, 942 F.2d 1001 (6th Cir.), cert. denied, 502 U.S. 1035 (1991)	17
United States v. *Decker*, 956 F.2d 773 (8th Cir. 1992)	12
United States v. *Fannin*, 817 F.2d 1379 (9th Cir. 1987)	17
United States v. *Frederickson*, 846 F.2d 517 (8th Cir. 1988)	16
United States v. *George*, 975 F.2d 72 (2d Cir. 1992)	10
United States v. *Hernandez-Escarsega*, 886 F.2d 1560 (9th Cir. 1989), cert. denied, 497 U.S. 1003 (1990)	17
United States v. *Krasaway*, 881 F.2d 550 (8th Cir. 1989)	17

Cases—Continued: Page

United States v. *Lampton*, 158 F.3d 251 (5th Cir. 1998), cert. denied, 525 U.S. 1183 (1999) 6
United States v. *Leary*, 846 F.2d 592 (10th Cir. 1988) 10
United States v. *Leon*, 468 U.S. 897 (1984) 6, 11
United States v. *McGrew*, 122 F.3d 847 (9th Cir. 1997) 9
United States v. *McLaughlin*, 851 F.2d 283 (9th Cir. 1988) 17
United States v. *Robertson*, 21 F.3d 1030 (10th Cir.), cert. denied, 513 U.S. 891 (1994) 16
United States v. *Spilotro*, 800 F.2d 959 (9th Cir. 1986) 10
United States v. *Washington*, 782 F.2d 807 (9th Cir. 1986) 17
United States v. *Willey*, 57 F.3d 1374 (5th Cir.), cert. denied, 516 U.S. 1029 (1995) 16

Constitution and statute:

U.S. Const. Amend. IV 10, 14
18 U.S.C. 1341 2

In the Supreme Court of the United States

No. 99-971

MARVIN CHERNA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 184 F.3d 403. The opinion of the district court (Pet. App. 24a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 1999. A petition for rehearing was denied on September 8, 1999 (Pet. App. 28a-29a). The petition for a writ of certiorari was filed on December 7, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the denial of his motion to suppress evidence, petitioner entered a conditional plea of guilty in the United States District Court for the Northern District of Texas to one count of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to 48 months' imprisonment, to be followed by a three-year term of supervised release, and fined $12,500. The court of appeals affirmed. Pet. App. 1a-23a.

1. Petitioner was the executive director of the Help Hospitalized Children's Fund (HHCF) and the American Veterans' Relief Fund (AVRP), two charities based in Dallas, Texas. Petitioner solicited funds for the two charities, which he operated out of his home, and then converted the contributions he received to his own use. Pet. App. 2a, 10a-11a.

a. Petitioner, using professional fundraisers, solicited donations for HHCF by representing that the money would benefit hospitalized children in the donor's community, and that part of the donated money would be spent to send terminally or chronically ill children and their families to Walt Disney World through another organization called Give Kids the World. HHCF brochures sent to potential donors represented that HHCF was a member of certain prestigious charitable organizations, such as the Child Life Council; that petitioner and other HHCF board members served without compensation; and that all of the funds solicited went to the charity, which spent approximately 20% of the funds raised to cover administrative costs. Further, HHCF induced the Combined Federal Campaign to place HHCF on its list of organizations to receive donations for the year 1995 by stating on its application that HHCF did not permit general

telephone solicitation of the public or the payment of commissions in connection with its fund-raising practices and that neither petitioner nor any other HHCF board member received any compensation. Pet. App. 40a-43a, 50a.

An FBI investigation revealed that HHCF was not a member of either Child Life council or Give Kids the World; neither organization had received any financial support from HHCF, and HHCF had never sent any children to Walt Disney World through Give Kids the World. Further, while HHCF set up numerous local bank accounts and post office boxes throughout the United States in order to lull donors into believing the money they pledged was being spent in their community, the donors' local hospitals had never heard of, and did not receive any donations from, HHCF. Instead, the funds were deposited in local banks and then transferred to accounts in Dallas. Moreover, although brochures sent to potential donors in Illinois bore the logo of a local hospital, that hospital had not given permission for HHCF to use its logo and had never received any donations from HHCF. Further, HHCF paid professional fundraisers a percentage of at least 75% of the donations received as commissions. Pet. App. 10a, 41a-46a,

b. Similarly, individuals solicited to make donations to AVRF were told that their donations would benefit local veterans' hospitals, and would be used to purchase wheelchairs, crutches, and other medical supplies for hospitalized veterans. Although AVRF's reported income for the tax year ending January 31, 1996, was $1,240,581, a survey of all VA hospitals in the United States for that period revealed that VA hospitals received only about $1249 in donations from AVRF. These donations consisted mostly of snack baskets and

a few books and games; there was no record of any type of medical equipment being provided. Pet. App. 47a-49a.

c. A review of HHCF's and petitioner's bank records revealed that during a three-month period in 1995, HHCF issued several checks totalling $3500 that were made payable to petitioner; during a four-month period in 1995, HHCF issued checks totaling $11,800 to petitioner's girlfriend and checks totaling $4400 to HHCF board members. From October 1995 to September 1996, HHCF made payments totaling $7260 to a health and social club in Dallas for meals, liquor, golfing green fees, and massages. Pet. App. 50a-52a.

2. On May 19, 1997, the FBI applied for a warrant to search petitioner's business and residence, both of which were located at 7610 Meadow Oaks Drive in Dallas, Texas. The affidavit in support of the application, and which was attached to it, outlined in detail the scheme described above. That information was compiled from interviews with witnesses; reviews of complaints filed with local Better Business Bureaus and State Attorney Generals' offices; HHCF and AVRP bank account records, tax returns, and financial statements; certifications made by petitioner to the CFC; and documents filed by petitioner with various States for the purpose of registering HHCF and AVRF to raise funds. See Pet. App. 40a. The affidavit recited that there was reason to believe that HHCF and AVRF were still being operated out of petitioner's residence because accounting firm employees on February 13, 1997, had observed two rooms at that address set up as offices for HHCF and AVRF, and an auditor was scheduled to meet with petitioner there on May 19, 1997, the date the warrant was executed. The affidavit further recited that a woman identifying

herself as an AVRF employee had accepted service of process at petitioner's home on April 18, 1997, and that the electric account for the residence was listed in HHCF's name as of May 11, 1997. *Id.* at 11a, 52a-53a.

The warrant application referred to two documents: Attachment A, which set forth the place to be searched, and Attachment B, which described the evidence to be seized. Attachment A stated that the HHCF and AVRF offices were located at 7610 Meadow Oaks Drive in Dallas, and included "all rooms/parts of the residence and the attached garage." Pet. App. 2a, 32a. Attachment B described the evidence subject to seizure as "Records and items related to Fraud by Wire and Mail Fraud as described in the affidavit of FBI agent Loretta Smitherman, within the premises [of] 7610 Meadow Oaks Drive, Dallas, Texas, including, but not limited to the following, however maintained," followed by a list of 26 categories of evidence, primarily written and electronic documents. *Id.* at 33a-36a. Category 26 consisted of "[r]eceipts o[r] other documentation of the purchase, of items of value, such as jewelry, electronic equipment, vacation packages, automobiles, etc. indicative that [petitioner] spent the money he obtained fraudulently on personal expenses and personal items." *Id.* at 36a.

The search warrant was executed under the direction of the affiant, Agent Smitherman. Before the search, the six FBI agents executing the warrant were required to read the warrant, the accompanying documents, and the affidavit. Petitioner was given a copy of the warrant and Attachments A and B. He was not shown a copy of the affidavit because it had been placed under seal; the affidavit, however, was present in Smitherman's vehicle throughout the search. Upon entering the premises, the agents determined that four

rooms were being used as office space, and that the garage had been converted into a telemarketing and record storage room. The agents did not limit their search to those rooms, but also searched all areas in the residence where records might be stored, including the bedroom, kitchen, and living room. Pet. App. 3a.

3. The district court denied petitioner's motion to suppress the items seized during the search. Pet. App. 24a-27a. The court found that the affidavit established probable cause for the issuance of the warrant, and that Attachment B to the warrant "set[] out with sufficient particularity twenty-six types of items to be seized so as to remove the warrant * * * from the purview of the prohibition of a general warrant." *Id.* at 26a. In the alternative, the court found that the officers executing the warrant "acted in good faith and in reasonable reliance upon the warrant's validity, thereby avoiding the Fourth Amendment's exclusionary rule." *Id.* at 25a.

4. The court of appeals affirmed. Pet. App. 1a-23a. Employing the two-step process set forth in *United States* v. *Lampton*, 158 F.3d 251, 258 (5th Cir. 1998), cert. denied, 525 U.S. 1183 (1999), the court declined to reach the issue of the warrant's validity, because it determined that the evidence seized thereunder was admissible under the good faith exception to the exclusionary rule established in *United States* v. *Leon*, 468 U.S. 897 (1984). The court found no evidence to show that the issuing magistrate had abandoned his role as a neutral and detached judicial officer. Pet. App. 8a. The court also held that, even though the warrant essentially authorized an "all records" search of petitioner's home, probable cause for such a broad search was not so lacking as to "render official belief in its existence entirely unreasonable." *Id.* at 10a. Summarizing the evidence set forth in Agent Smitherman's 11-page

affidavit, and referring to Smitherman's conclusions that petitioner's business activities were "merely a scheme to defraud" and that there was considerable overlap between petitioner's personal and business lives, the court held that the affidavit "was not so 'bare bones' as to render all belief in the existence of probable cause for an all records search unreasonable." *Id.* at 11a-12a. Rejecting petitioner's claim that the affidavit was based on stale information dating from one to two years before the application for the warrant, the court stated that "in light of the facts that HHCF and AVRF were ongoing businesses and that financial records typically are retained for long periods of time, we cannot say that Smitherman's affidavit was based on stale information." *Id.* at 12a.

The court also held that the warrant was not so lacking in particularity that the executing officers could not reasonably have relied on it. Pet. App. 13a-19a. The court rejected the contention that reliance on the warrant was unreasonable because the warrant authorized the seizure of records related to wire and mail fraud as described in the affidavit. The court explained that the issuing judge had made a probable cause determination, the affidavit explained in detail the particular fraudulent scheme of which evidence was sought, the officer in charge of the search was the affiant, and the other FBI agents who participated in the search had read the affidavit prior to the search. The court reasoned that, as in *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984), any defect in the warrant occasioned by the absence of the affidavit "could have been remedied with only minor corrections, such as the attachment of the affidavit." Pet. App. 16a. Thus, the court did not reach the issue of whether the warrant was in fact invalid because the affidavit was not

attached to it, instead concluding that "[a] reasonable executing officer, relying on the magistrate judge's issuance of the warrant and sealing of the affidavit, could have believed that the reference to the affidavit and the rather lengthy list that followed satisfied the Fourth Amendment's particularity requirement." *Id.* at 17a.

Finally, the court rejected petitioner's claim that the evidence at the suppression hearing established the absence of good faith on Agent Smitherman's part. Petitioner had claimed that Agent Smitherman could not have been acting in good faith because she drafted Attachment B to contain the "including, but not limited to" language that petitioner claimed authorized a general search. See Pet. App. 33a. Agent Smitherman, however, testified that the warrant authorized the seizure only of evidence related to mail and wire fraud as described in the affidavit, and that "[w]hile she did testify that the warrant permitted her to exercise some discretion with respect to identifying such evidence, she apparently also believed that Attachment B adequately identified the scope of her search." *Id.* at 22a.

In sum, the court upheld the warrant under the good faith exception to the exclusionary rule because it found that the officers in this case took every step that could reasonably be expected of them:

> Smitherman prepared a detailed affidavit that was reviewed by two Assistant United States Attorneys. She then presented the affidavit to a neutral magistrate judge, who found it sufficient to support probable cause to search [petitioner's] residence and issued a warrant authorizing such action. Although he sealed the affidavit, the warrant referenced it and contained a list of twenty-six

> categories of evidence subject to seizure. All the officers participat[ing] in seizing evidence read the affidavit and, therefore, were familiar with the objects of the search. Our law simply does not require a reasonable officer to do more.

Pet. App. 23a.

ARGUMENT

The court of appeals' decision declining to suppress the evidence in this case is correct and does not conflict with any decision of any other court of appeals. Further review of the judgment in this case is therefore not warranted.

1. Petitioner contends (Pet. 18-19) that the Fifth Circuit's holding that the officers could have relied in good faith on the warrant conflicts with the Ninth Circuit's decision in *United States* v. *McGrew*, 122 F.3d 847 (1997). In petitioner's view, the Ninth Circuit in *McGrew* held that the officers in an analogous situation could not have reasonably believed that the warrant itself was not overbroad, and they could not rely on an unattached affidavit to narrow the scope of the warrant. Petitioner's contention is mistaken.

First, there was a substantially stronger basis for the officers' good-faith belief in the validity of the warrant in this case than in *McGrew*. The warrant in *McGrew* did not itself identify the suspected crimes and it did not specify the evidence to be seized; instead, it purported to "incorporate" an "attached affidavit" that the issuing magistrate sealed. 122 F.3d at 849. The government, however, "offered no evidence that the affidavit or any copies were ever attached to the warrant or were present at the time of the search," and it was "highly questionable" that "the agents [who conducted the search] were aware of the contents of the

affidavit." *Ibid.* The Ninth Circuit held that the agents could not claim good faith reliance on the affidavit's contents, when the affidavit did not accompany the warrant. 122 F.3d at 850. Here, by contrast, the warrant had far more detail than the warrant in *McGrew*, since it described 26 categories of items that were subject to seizure and stated that those items were related to the specific mail and wire fraud offenses that were described in the affidavit.[1] Moreover, the evidence showed that the affidavit had been attached to the warrant, that the agents who conducted the search had read the warrant and affidavit, and that the

---

[1] Petitioner asserts that "[t]he unconstitutional breadth of the Warrant is exacerbated in this case by the fact that both the Warrant and the Smitherman Affidavit reference the amorphous crimes of mail fraud and wire fraud." Pet. 13. The warrant did not, however, merely refer to "amorphous crimes" by reference to their statutory citations. Instead, it referred to "Fraud by Wire and Mail Fraud *as described in the affidavit*." Pet. App. 33a (emphasis added). In that respect, this case differs substantially from cases cited by petitioner (Pet. 13-14) in which courts have held that a broad reference to a federal offense by its statutory citation is insufficient in some circumstances to satisfy the Fourth Amendment's particularity requirement. For example, in *United States* v. *Leary*, 846 F.2d 592, 601 (10th Cir. 1988), the warrant permitted a search for any document showing a violation of two general federal statutes. In *United States* v. *Spilotro*, 800 F.2d 959, 964-965 (9th Cir. 1986) (Kennedy, J.), the only limitation on the warrants was that the items seized be evidence of a violation of any one of 13 statutes. See also *United States* v. *George*, 975 F.2d 72, 75-76 (2d Cir. 1992) (holding overbroad a warrant that did not mention a particular crime or statutory provision at all, but instead authorized seizure of a number of specific items and "any other evidence relating to the commission of a crime").

affidavit was present at the scene of the search. Pet. App. 3a.[2]

Second, the Ninth Circuit's rejection of the good faith argument in *McGrew* was based in substantial part on that court's view that the officers should have known of the warrant's alleged defects because it had been "[t]he well settled law of this circuit" that "a search warrant may be construed with reference to the affidavit" only if the affidavit is physically attached to the warrant. 122 F.3d at 849. In this case, the Fifth Circuit noted that "it is not entirely clear from circuit precedent that the affidavit must be physically attached to the warrant or served on the defendant." Pet. App. 17a. Accordingly, even under the reasoning of *McGrew*, the agents in this case had an objectively reasonable basis to believe that the warrant was valid.

2. Petitioner contends (Pet. 25-27) that this case falls within the exception to the *Leon* good-faith exception applicable in cases in which the magistrate has "fail[ed] to manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application." *Leon*, 468 U.S. at 914 (internal quotation marks omitted; citing *Lo-Ji Sales, Inc.* v. *New York*, 442

---

[2] Petitioner contends that other FBI personnel who accompanied the agents "were clearly involved in seizing the evidence" but had not been instructed to read the warrant and the affidavit. Pet. 5 n.5. As the court of appeals stated, however, the agents who executed the search warrant "were required by FBI policy to read the warrant, the accompanying documents, and the affidavit prior to participating in the search." Pet. App. 3a. See also *id.* at 23a ("All the officers [that] participated in seizing evidence read the affidavit and, therefore, were familiar with the objects of the search."). It was therefore of no consequence "whether several other FBI employees who assisted in the search but did not participate in seizing evidence read the affidavit." *Id.* at 3a.

U.S. 319, 326-327 (1979)). The Fifth Circuit, however, concluded, "[a]fter carefully reviewing the record, * * * that there is no evidence that the issuing magistrate * * * abandoned his role as a neutral and detached judicial officer." Pet. App. 8a. That conclusion was correct, especially in light of the fact that, as the court of appeals noted, "[petitioner] does not so much as allege that [the magistrate judge] was biased." *Ibid.* Indeed, petitioner's sole contention on this point (Pet. 26-27) is that the magistrate authorized a warrant that petitioner asserts was in fact invalid. That is obviously insufficient to establish that the magistrate has abandoned his judicial role, as this Court's decisions in *Leon* and *Massachusetts* v. *Sheppard*, 468 U.S. 981 (1984), establish. In any event, further review of the court of appeals' fact-bound conclusion that petitioner failed to show that the magistrate had abandoned his judicial role would be unwarranted.[3]

3. Petitioner also asserts (Pet. 27-29) that the court of appeals' holding that the good-faith exception was applicable in this case conflicts with this Court's decision in *Sheppard*. As the court of appeals noted (Pet. App. 22a-23a), however, this case is supported by *Sheppard* because in both cases, "[t]he officers * * * took

---

[3] The Fifth Circuit's decision does not conflict with the Eighth Circuit's conclusion that the magistrate in *United States* v. *Decker*, 956 F.2d 773, 777 (1992), had abandoned his duty by "act[ing] as a rubber stamp". In *Decker*, "the issuing judge signed the warrant without reading it and * * * failed to note both that the prosecutor had not signed the warrant [as required by state law] and that the warrant did not list the property to be seized." *Ibid.* In this case, by contrast, there was no evidence that the magistrate had failed to read the warrant, that the warrant lacked a required signature, or that the warrant did not list the property to be seized.

every step that could reasonably be expected of them." The court of appeals explained:

> Smitherman prepared a detailed affidavit that was reviewed by two Assistant United States Attorneys. She then presented the affidavit to a neutral magistrate judge, who found it sufficient to support probable cause to search [petitioner's] residence and issued a warrant authorizing such action. Although he sealed the affidavit, the warrant referenced it and contained a list of twenty-six categories of evidence subject to seizure. All the officers [that] participated in seizing evidence read the affidavit and, therefore, were familiar with the objects of the search.

Id. at 23a. For those reasons, this Court's conclusion in *Sheppard* that the evidence should not be suppressed is equally applicable here.

Petitioner attempts to distinguish *Sheppard* by claiming (Pet. 28) that Agent Smitherman, in contrast to the officers in *Sheppard*, "intentionally sought unfettered discretion to seize virtually any item located on the target premises." That, however, is a mischaracterization of Smitherman's testimony. The court of appeals quoted the pertinent testimony at length, Pet. App. 19a-22a, and it concluded that although the testimony "is sometimes equivocal," Smitherman "did not admit that she had drafted the warrant to give her complete discretion to seize any item she wished." *Id.* at 22a. The court noted that Smitherman instead had "stated repeatedly that the warrant authorized the seizure only of evidence related to mail and wire fraud as described in her affidavit." *Ibid.* Although "she did testify that the warrant permitted her to exercise some discretion with respect to identifying such evidence, she

apparently also believed that Attachment B [the description of the items to be seized] adequately identified the scope of her search." *Ibid.* Just as in *Sheppard*, the evidence here showed that the officer sought a warrant that she believed would be constitutionally valid. The court of appeals' decision that the good-faith exception applies here is therefore supported by—and certainly does not conflict with—this Court's decision in *Sheppard*.

Petitioner also appears to suggest (Pet. 28) that the Fifth Circuit's ruling in this case conflicts with the Ninth Circuit's decision in *Center Art Galleries-Hawaii, Inc.* v. *United States*, 875 F.2d 747, 753 (1989). The warrant in this case, however, did not have the features that made the Ninth Circuit hold the warrant in *Center Art Galleries* to be so defective that it could not support a good-faith belief in its validity. The warrant in *Center Art Galleries* provided for the "almost unrestricted seizure of items which are 'evidence of violations of federal criminal law' without describing the specific crimes suspected." *Id.* at 750. Here, by contrast, the warrant stated that the items to be seized related to specific instances of wire and mail fraud as described in the affidavit and listed 26 specific categories of items to be seized. The Ninth Circuit's conclusion that the agents in *Center Art Galleries* could not have relied on the warrant in that case accordingly does not conflict with the Fifth Circuit's conclusion that the agents in this case acted in objectively reasonable reliance on the search warrant here.

4. Petitioner also argues extensively (Pet. 11-17, 19-25) that the warrant in this case was in fact invalid under the Fourth Amendment, either because it lacked

particularity[4] or because it lacked probable cause.[5] The court of appeals, however, did not reach any question

---

[4] Petitioner's major challenge (Pet. 19-25) to the particularity of the warrant is that it authorized a seizure of all of his business records in a search to be conducted at his house. Petitioner cites no case, however, in which a court of appeals has held that an "all records" search—even one conducted in a house—could never be constitutionally justified. To the contrary, even the decisions cited by petitioner accept that, where a business is permeated with fraud, essentially all of the records of the business potentially contain evidence of the crime and are thus subject to seizure. Moreover, it was petitioner who decided to conduct his fraudulent businesses in his house and who decided that the electricity account for the house should be listed in the name of one of his fraudulent businesses. In those circumstances, an all-records search of petitioner's house was appropriate.

[5] Petitioner's major challenge to the existence of probable cause to conduct a broad search for his business records centers (Pet. 23) on language in the affidavit showing that the charities he ran did, in fact, make some donations to benefit hospitalized children and veterans. The theory of fraud in this case, however, was not that the charities had made *no* donations to the causes they purported to support. Instead, the theory of fraud was that they fraudulently raised money by making specific false representations that most of the money raised would be used for the specified charitable purposes. See, *e.g.*, Pet. App. 41a ("majority of funds donated are used for charitable purposes"); *id.* at 43a ("20% of the funds raised would go to cover administrative costs"). The fact that a tiny percentage of the amount raised (for example, one-tenth of one percent of AVRF's income for the year ended January 31, 1996, was used for charitable purposes, see Pet. App. 11a) does not detract from the conclusion that there was probable cause to believe that petitioner's charities had engaged in fraud.

Relying on *Riley* v. *National Federation of the Blind*, 487 U.S. 781, 792-793 (1988), petitioner also challenges (Pet. 25) the affidavit's assertion that the payments that were made to telemarketing companies for their fundraising services constituted evidence of the fraud. In *Riley*, the Court struck down on First Amendment grounds a state statute prohibiting professional

regarding the validity of the warrant. Instead, the court decided the case solely on the ground that, even if the warrant were invalid, the evidence seized would be admissible pursuant to the *Leon* good-faith exception to the exclusionary rule. This Court ordinarily does not grant review to consider questions that were not decided by the court of appeals. Moreover, because the court of appeals did not rule on the substantive validity of the warrant, its decision could not conflict with any of the various decisions cited by petitioner for the proposition that the warrant was invalid.[6] Finally, further

---

fundraisers from retaining an "unreasonable" or "excessive" fee and defining a fee of 35% as presumptively unreasonable. In so ruling, the Court observed that "there is no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent." 487 U.S. at 793. As the Court observed in *Riley*, however, the government could achieve the objective of reducing donor misperception by more narrowly tailored means, such as "vigorously enforc[ing] its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements." *Id.* at 800. That is precisely what was done here.

[6] Petitioner argues that the "including, but not limited to" language in the warrant rendered it overbroad. It is settled, however, that the inclusion of such language in a warrant will not be construed so as to defeat the particularity of the main body of the warrant. Thus, in *Andresen* v. *Maryland*, 427 U.S. 463 (1976), the warrant gave a list of specific items to be seized, followed by the phrase "other fruits, instrumentalities and evidence of crime at this [time] unknown." *Id.* at 479. The Court held that the warrant was not impermissibly general. *Id.* at 480-481. See *United States* v. *Willey*, 57 F.3d 1374, 1390 (5th Cir. 1995), cert. denied, 516 U.S. 1029 (1995); *United States* v. *Robertson*, 21 F.3d 1030, 1033-1034 (10th Cir.), cert. denied, 513 U.S. 891 (1994); *United States* v. *Frederickson*, 846 F.2d 517, 520 (8th Cir. 1988); *United States* v. *Abrams*, 615 F.2d 541, 547 (1st Cir. 1980) ("We read *Andresen* to mean that the 'general' tail of the search warrant will be construed

review would not in any event be warranted to consider the question whether the particular warrant in this case did or did not satisfy constitutional standards of particularity or probable cause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

JAMES K. ROBINSON
Assistant Attorney General

DEBORAH WATSON
Attorney

MARCH 2000

---

so as not to defeat the 'particularity' of the main body of the warrant."). Indeed, courts routinely reject overbreadth challenges to warrants containing the "including, but not limited to" language. See *United States* v. *Blakeney*, 942 F.2d 1001, 1026-1027 (6th Cir.), cert. denied, 502 U.S. 1035 (1991); *United States* v. *Hernandez-Escarsega*, 886 F.2d 1560, 1567-1568 (9th Cir. 1989), cert. denied, 497 U.S. 1003 (1990); *United States* v. *Krasaway*, 881 F.2d 550, 551-553 & n.2 (8th Cir. 1989); *United States* v. *McLaughlin*, 851 F.2d 283, 285-286 (9th Cir. 1988); *United States* v. *Fannin*, 817 F.2d 1379, 1381-1383 (9th Cir. 1987); *United States* v. *Washington*, 797 F.2d 1461, 1472 (9th Cir. 1986).